APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

ONE 1969 PLYMOUTH FURY AUTOMOBILE,
SERIAL NO. PM43G9D199088,
Defendant.

Ford Motor Credit Company,
Intervenor-Appellant.

No. 72-2844.

United States Court of Appeals,
Fifth Circuit.

April 19, 1973.

Before WISDOM, GEWIN and COLEMAN, Circuit Judges.

PER CURIAM:

Ford Motor Credit Company (FMCC) appeals from a summary judgment forfeiting title and possession of a 1969 Plymouth Fury automobile to the United States. The record owner was charged and convicted of using the automobile for the unlawful transportation of counterfeit federal reserve notes. 49 U.S.C. §§ 781, 782, The owner had paid $100 down; FMCC's security interest exceeded the value of the car. We affirm.

FMCC contends that: (1) the forfeiture provisions found in 49 U.S.C. §§ 781, 782 were unconstitutionally applied; (2) the forfeiture statutes found in 49 U.S.C. §§ 781, 782 are unconstitutional on their face because they authorize deprivation of property without due process of law and the taking of prop-

erty from a totally innocent party without just compensation; and (3) 49 U.S.C. § 782 is so discriminatory that it violates due process of law.

These are serious contentions well-briefed and well-argued by counsel for FMCC. There is, of course, a distinction between a title-holder and the holder of a security-interest; a company financing the purchase of automobiles knows that it runs the risk of having its interest forfeited, if the car is used to transport contraband. On the other hand, it is incongruous that an innocent lienor whose equitable interest may far exceed the owner's interest is in a worse position than an innocent record owner. It may even be said that the forfeiture is an anachronistic relic of deodand.

If this were a case of first impression, we would examine closely and weigh carefully the competing values in the opposing arguments. But we are bound by decisions of this Court too numerous to cite upholding such forfeitures. FMCC argues, however, that in United States v. United States Coin and Currency, 1971, 401 U.S. 715, 91 S. Ct. 1041, 28 L. Ed. 2d 434, the Supreme Court took a new look at forfeitures and interpreted the statute as applicable only when the owner has "significantly participated in the criminal enterprise." The Court said

> "The Government contends that the guilt of the owner of the money is irrelevant. . . . If we were writing on a clean slate, this claim that § 7302 operates to deprive totally innocent people of their property would hardly be compelling. Although it is true that the statute does not specifically state that the property shall be seized only if its owner significantly participated in the criminal enterprise, we would not readily infer that Congress intended a different meaning."

In that case an owner, not a lienor was involved, a difference that arguably is a significant distinction. In United States v. One 1970 Buick Riviera, 5 Cir. 1972, 463 F. 2d 1168, the contentions were similar to those raised here. This Court rejected the due process and just compensation arguments and, importantly, concluded that United States v. United States Coin and Currency was inapplicable.

We note also that 19 U.S.C. § 1618 allows remission or mitigation of the penalty at the discretion of the Secretary of the Treasury:

> "[T]he Secretary of the Treasury, if he finds that such fine, penalty or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, . . ."

Here FMCC took advantage of this provision but was unsuccessful in convincing the Secretary of the Treasury that he should remit or mitigate the forfeiture of the Plymouth Fury to the extent of its lien interest in the automobile.

The judgment must be affirmed.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

ONE 1969 PLYMOUTH FURY AUTOMOBILE,
SERIAL NO. PM43G9D199088,
Defendant.

Ford Motor Credit Company,
Intervenor-Appellant.

United States Court of Appeals,
Fifth Circuit.

March 20, 1975.

Appeal from the United States District Court for the Northern District of Texas; Joe Ewing Estes, Judge.

ON PETITION FOR HEHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 19, 1973, 5 Cir., 1973, 476 F. 2d 960).

Before WISDOM, GEWIN and COLEMAN, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also denied. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974).

GOLDBERG, Circuit Judge, took no part in the decision on the petition for rehearing en banc.

WISDOM, Circuit Judge, with whom BROWN, Chief Judge, and AINSWORTH, DYER, CLARK and GEE, Circuit Judges, join, dissenting.

I respectfully dissent both on the merits and on the Court's failure to grant a rehearing en banc.

In this case the record owner of the automobile was charged and convicted of using it to transport counterfeit federal reserve notes. 49 U.S.C. §§ 781, 782. The owner had made a down payment of only $100. Ford Motor Credit Company's (F.M.C.C.'s) security interest far exceeded this amount.

FMCC's position is that the United States Supreme Court in United States v. United States Coin and Currency, 401 U.S. 715, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971), has put a judicial gloss on the federal forfeiture statutes so that when they are interpreted with 19 U.S.C. § 1618

> " . . . [I]t is manifest that they [the forfeiture statutes] are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *Coin* at 721-22, 91 S. Ct. at 1045.

The Supreme Court has recently reiterated its holding in *Coin* in Calero-Toledo v. Pearson Yacht Leasing Company, 1974, 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452.

In *Pearson,* a yacht was forfeited under the Puerto Rico forfeiture statutes. The owner of the yacht challenged the statutes as unconstitutional, relying on *Coin.* The Supreme

Court held that the Puerto Rico forfeiture statutes were constitutional; however, it drew a distinction between the Puerto Rican statutes and the federal statutes. The Supreme Court reiterated its holding in *Coin* that the federal forfeiture statutes must be read with federal remission statute, 19 U.S.C. § 1618, which requires forfeiture only from persons "significantly involved in criminal enterprise," and pointed out that no similar remission statute exists in the Puerto Rican forfeiture statutes to protect innocent owners. Consequently, the harsh pre-*Coin* cases denying innocent owners relief from various forfeiture statutes were held to be applicable to Puerto Rico's remissionless forfeiture statutes.

The Court in *Pearson* stated:

> "This is not to say, however, that the 'broad sweep' of forfeiture statutes remarked in *Coin & Currency* could not, in other circumstances, give rise to serious constitutional questions. Chief Justice Marshal intimated as much over a century and a half ago in observing that 'a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of the forfeiture may be employed.' (citation deleted). It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. (citations deleted). Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that the forfeiture served legitimate purposes and was not unduly oppressive." (citations deleted). *Pearson,* supra, 416 U.S. at 688, 94 S. Ct. at 2094.

I read *Coin* as holding that in all forfeitures there is a

statutory requirement that the party sustaining the penalty be guilty of some form of fault, intentional or negligent. The appellant pitches its argument entirely on constitutional grounds. Here the Government conceded that the Company was not at fault. What is involved is the question of the Government's statutory or constitutional power to impose a penalty on an innocent party. It offends me that an innocent person who is the constructive owner and indeed is the owner of almost all of the equitable interest in the car, has his property forfeited for the acts of another person.

The theory underlying the forfeiture is stated in the Government's brief, as follows:

> 'That claimants of vehicles seized under the provisions of 47 [49] U.S.C. §§ 781 and 782, are not entitled to relief from forfeiture by reason of their good faith or innocence is well established. The claimant, in order to prevent or preclude the forfeiture of the vehicle, must establish the vehicle's innocence, and the good faith or innocence of the claimant of said vehicle, in respect of the offense with which the vehicle is concerned, is immaterial. The vehicle is condemned as the offender and becomes subject to seizure upon its use in violation of the express provisions of the statute."

This rationale is barbaric, a vestigial relic of deodand. It is anomalous to treat an innocent lien-holder as harshly as the criminal owner of the automobile. *Coin* and *Pearson* throw new light on the subject of forfeitures and allow inferior courts to reexamine the subject without doing violence to the long line of pre-*Coin* cases upholding the Government's position.

I would reverse.